SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-109

No. 1533

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

REPLY BRIEF

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In his Brief in Opposition, the Attorney General of Maryland argues that the procedural rule enforced in petitioner's case serves a legitimate state interest and has been in effect since 1852. This rule provides that a pretrial motion is the *only* vehicle by which a criminal defendant can question the validity of the governing statute. Applied to petitioner's case, this rule blocked state court adjudication of important public and constitutional issues which were raised three times at trial and four times on direct appeal.

Clearly, no legitimate state interest abides in so drastic an application of a procedural rule which is not "clearly announced to defendant and counsel." *Henry* v. *Mississippi,* 379 U.S. 443, 448 n. 3 (1965).[1] Contrary to the Attorney General's contentions, Maryland has not insisted since 1852 that a defendant lose his right to question the validity of a criminal statute by failing to do so by pretrial motion.

Chapter 63 of the Laws of Maryland of 1852[2] did provide explicitly that no judgment should be reversed for any reason which might have been the subject of demurrer to the indictment, and in 1858, this rule was applied to bar an attack on a statute. *Cowan* v. *State,* 12 Md. 236 (1858). But that was the last time that the rule was enforced—until petitioner's case. Indeed, in *Foote* v. *State,* 59 Md. 264 (1883), quoted by the Attorney General, the appellate court considered the constitutionality of a statute which had not been attacked by demurrer.[3]

In 1949, Chapter 63 was superseded by Rule 3, which was substantively the same as the present Rule 725 (b).[4] Neither rule provided that an objection to an

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[1] In *Parker* v. *North Carolina,* 397 U.S. 790, 798 (1969), relied on by the Attorney General, the procedural rule was explicit, and there could be no misunderstanding of it. That is not the case here.

[2] See Respondent's Exhibit A.

[3] *State* v. *Lassotovitch,* 162 Md. 147, 159 A. 362 (1932), also relied upon by the Attorney General, is simply an example of a situation where a statute *was* attacked by demurrer, and does not support the proposition it is cited for—that the right to question a statute is forever lost unless asserted before trial.

[4] Effective January 1, 1950, Rule 3 is Respondent's Appendix B.

unconstitutional statute was waived unless asserted before trial. Indeed, each provided that "lack of jurisdiction" or "failure to change an offense" [5] could be noticed at any time. Thus a rule which may have been explicit — if seldom enforced — in 1852 was abandoned, in appearance at least, in 1949. In substance, too, the rule was abandoned, for neither we nor the Attorney General have found any case since then—other than petitioner's—in which the rule was applied to block consideration of a challenge to a statute which was raised at trial, albeit by other procedural vehicles.

In *Henry* v. *Mississippi, supra,* this Court stated:

> In every case we must inquire whether the enforcement of a procedural forfeiture serves such a [legitimate] state interest. [379 U.S. at 447.]

Petitioner raised the question on which he desires a decision three times at trial. As in *Henry,* the purpose of the procedural rule was substantially served. Whatever its merits in the abstract or for the future, the rule invoked by the Attorney General serves no legitimate interest here, where it was previously neither enforced or clearly announced.

In his Brief in Opposition, the Attorney General notes also the Maryland court's concern that the record did not contain evidence appropriate for constitutional adjudication. Recognizing this, petitioner sought remand for an evidentiary hearing on the important constitutional issues involved herein—under

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[5] The unconstitutionality of a statute constitutes a "failure to state an offense" under Rule 12 of the Federal Rules of Criminal Procedure, which the Maryland court noted was virtually the same as Rule 725. 8 *Moore, Federal Practice* ¶ 12.03[2].

a rule specifically authorizing remand where "the substantial merits of a case will not be determined" otherwise.[6] Petitioner seeks no more here.

Respectfully submitted,

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[6] Rule 1071 of the Maryland Rules of Procedure.